(1)

90-154

Supreme Court, U.S.
FILED
JUL 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER A - 920

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

ELIJAH DAVIS,
PETITIONER

VERSUS

UNITED STATES POSTAL SERVICE,
RESPONDENT

OCTOBER TERM 1990

ON WRIT OF CERTIORARI TO THE
FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR CERTIORARI

BENJAMIN JONES
JONES AND SMITH LAW OFFICE
P. O. BOX 3025
1110 JACKSON STREET
MONROE, LOUISIANA 71210
(318) 322-1126

ATTORNEY FOR PETITIONER

I. QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals was correct in affirming the dismissal of petitioner's *pro se* discrimination suit on the basis that the court lacked jurisdiction.

II. TABLE OF CONTENTS

	PAGE
Opinion Below	2
State of Jurisdiction	3
Statutory Provision Involved	3-4
Statement of the Case	4-8
Reasons for Granting Writ	8-10
Argument	10-13
Certificate	14
Appendix A	15-19
Appendix B	20-22
Appendix C	23
Appendix D	24-25

III. TABLE OF AUTHORITIES

	PAGE
Bell v. Veterans Administration Hospital 826 F.2d 357 (5th Cir. 1987)	9,17
Johnson v. Burnley, 887 F.2d. 471	9,11
Lamb v. United States Postal Service 852 F.2d. 845 (5th Cir. 1988)	17
Schoavone v. Fortune, 477 U.S. 21 106 S. Ct. 2379,912 Ed.2d 18 (1986)	10, 18
Statutes	
28 U.S.C. Sec 2101	3
42 U.S.C. Sec 2000e-5	4
42 U.S.C. Sec. 2000e-16(c)	2,3,8,10
Rules	
Supreme Court Rule 10.1(a)	3,10
Fed. R. Civ. P. 56	24

In the Supreme Court

of the United States

No. A-920

ELIJAH DAVIS,

Petitioner

versus

UNITED STATES POSTAL SERVICE,

Respondent

Petition For Writ of Certiorari

to the Honorable Fifth Circuit Court

of Appeals

The petition of Elijah Davis respectfully requests that a writ of certiorari issue herein to review the judgments and orders of the Fifth Circuit Court of Appeals rendered in this matter or February 6, 1990 and on March 20,

1990, dismissing petitioner's discrimination suit. In deciding to dismiss petitioner's suit, both the Federal District Court and the Fifth Circuit Court of Appeals interpreted the thirty-day period for filing a discrimination suit found in 42 U.S.C. Sec. 2000e-16(c) as being jurisdictional, rather than a statute of limitations.

IV. Opinions Below

The opinion rendered by the Fifth Circuit Court of Appeals was not published, but it is attached hereto as Appendix A. We have attached as Appendix B the Order denying a rehearing. And, as Appendix C, the order by which Mr. Justice White extended the time to file this petition to and including July 18, 1990.

V. Statement of Jurisdiction

The petitioner shows that this court has jurisdiction to provide discretionary review of this case based on Rule 10.1(a) of the Rules of this Honorable Court and 28 U.S.C. Sec. 2101. The Fifth Circuit Court of Appeals decision in this case is in conflict with decisions rendered on the same subject by several other circuits, as will be demonstrated herein in section VIII.

VI. Federal Statutory Provisions Involved

The statutory provision involved in this action is 42 U.S.C. Sec. 2000e-16(c), which provided as follows: "Within thirty days of receipt of notice of final action taken by a department, agency or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such

department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section... an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

VII. Statement of the Case

A. Statement of Facts

The petitioner was appointed as an employee of the United States Postal Service on January 19, 1985. He was assigned to duty as a carrier on one of the most difficult routes in Dallas,

Texas. Because he experienced continued difficulty in completing the route timely, he had some problems with management. He requested, but did not receive, help on the route; there is a procedure and a form for requesting such assistance.

Despite his best efforts, petitioner received warnings and a 7 and 14-day suspension, allegedly for unsatisfactory work performance. He was not allowed to grieve the 7-day suspension.

The evidence is expected to show at trial that petitioner is a black male , and that white persons who had worked that difficult route to which he was assigned received requested assistance.

The petitioner was terminated following the 14-day suspension. He exhausted the available administrative remedies, and an EEOC final notice was

issued and received by him on February 17, 1988.

B. Proceedings Below

On March 15, 1988, petitioner filed an application to proceed in forma pauperis, which application was denied. On May 5, 1988, petitioner filed suit in the United States District Court for the Northern District of Texas, Dallas Division. The petitioner was representing himself; he had no formal training in law, and had little concept of how federal courts apply court rules. He knew nothing about statutes of limitations or rules related to pleading and service of process.

Petitioner did not know to name the Postmaster General as a defendant when he filed suit, nor did he file the actual suit by April 15, 1988, which was the 30th day after he received the final

notice of right to sue from EEOC, where he had protested his termination on the basis of racial discrimination.

The United States Postal Service was named as defendant, and was served, along with the United States Attorney, who was served September 2, 1988.

On November 14, 1988 counsel for the Postal Service filed a motion to dismiss, which was treated as a motion for summary judgment and granted on December 16, 1988. Appendix D. Petitioner requested reconsideration, but the request was denied.

Petitioner appealed to the Fifth Circuit Court of Appeals, and on February 6, 1990 that court affirmed the dismissal. Rehearing was denied on March 20, 1990.

Petitioner secured the Rules of this Court to attempt to file this petition,

but later retained undersigned counsel, who requested and receive from Mr. Justice White a 30-day extension of time to file this petition.

VIII. Reasons For Granting Writ

The petitioner tried to represent himself and was unprepared to deal with all the rules and laws that applied. He was unable to hire counsel at the time suit was filed, and that is why he took on the task of being his own lawyer. Indeed, with little assistance, he represented himself in the Court of Appeals.

The petitioner has been denied his day in court, because his case has been dismissed on procedural grounds, namely, failure to sue within 30 days after February 17, 1988 and failure to name the Postmaster General as a Defendant. 42 U.S.C. Sec. 2000e-16(c).

The decision of the Fifth Circuit Court of Appeals takes the position that the District Court was correct in dismissing petitioner's suit because of his failure to sue the Postmaster General within 30 days after February 17, 1988. The court, relying on prior law of that circuit, found that the district court did not have jurisdiction to hear the case. Bell v. Veterans Administration Hosp., 826 F.2d 357, 360-61 (5th Cir. 1987). However, several other circuits have held that the 30-day requirement is not a jurisdictional matter, but essentially a statute of limitations, subject to equitable tolling. Johnson v. Burnley, 887 F.2d 471 (5th Cir. 1989).

Since there is a deep conflict in the circuits on the question of whether the 30-day filing requirement in 42

U.S.C. Sec. 2000e-16(c) is jurisdictional or a statute of limitations, this court is urged to take this case on certiorari to resolve the conflict. Rule 10.1(a). Further, this would be a proper case in which to apply equitable principles, so as to preserve petitioner's right to go to trial. He made a filing on or before the 30th day after he received the final EEOC notice, asking that he be allowed to prosecute his suit in forma pauperis. In the case of a person acting as his own lawyer, that should be sufficient to preserve his rights. And holding that this filing satisfied the 30-day limitations period would not seem to offend Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed.2d 18 (1986).

IX. ARGUMENT

It makes a great deal of difference to petitioner whether the

requirement that suit be filed within 30 days after final EEOC notice is treated as a statute of limitations or as a jurisdictional matter. And there is a conflict in the circuits in the matter. If the requirement is held to be a statute of limitations, then petitioner may still have a chance to present his case. On the other hand, if the requirement is held to be jurisdictional, petitioner would have no chance to ever present his evidence to a trial court.

As noted above, the circuits are badly split on the matter. The Third, Eighth, Tenth, Eleventh and D.C. circuits have taken the position that the 30 day delay is non-jurisdictional, while the Fifth, Seventh, and Ninth Circuits treat the requirement as being jurisdictional. These cases are collected in Johnson v. Burnley, 887 F 2d 471 (4th Cir. 1989), at

pp. 474-479, which case discusses this issue in great detail.

The petitioner urges this court to grant his petition, which presents this issue very clearly and pointedly. For, although there was some minor discussion of the substance of the case, the case turned squarely on the issue presented here.

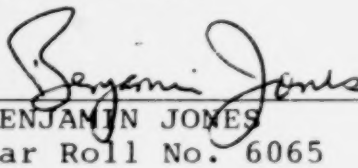
Conclusion

The Fifth Circuit was wrong in affirming the district court's holding that it lacked jurisdiction to hear petitioner's case, because the actual suit was not file naming the Postmaster General within thirty days after February 17, 1988. Five other Circuits have taken a different position, while two Circuits side with the Fifth.

Accordingly, petitioner prays that this Honorable Court grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

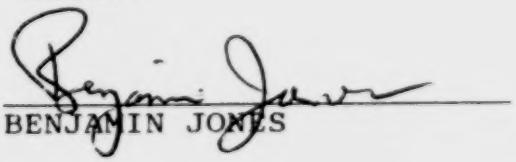
JONES & SMITH LAW OFFICES
1110 JACKSON STREET
POST OFFICE BOX 3025
MONROE, LOUISIANA 71210-3025
(318) 322-1126

BY: 

BENJAMIN JONES
Bar Roll No. 6065

Certificate

I hereby certify that three copies of the foregoing petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon the Honorable Kenneth W. Starr, Solicitor General of the United States, at his business address, U. S. Department of Justice, 10th and Constitution Avenue, Northwest, Room 5413, Washington D. C., 20530, this 17th day of July, 1990. I also certify that the Appendices attached are an accurate recordings from the copy of the documents in my files.



BENJAMIN JONES

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-1594

Summary Calendar

ELIJAH DAVIS,

Plaintiff-Appellant

versus

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States

District Court for the

Northern District of Texas

(CA-3-88-1008-R)

(February 6, 1990)

Before REAVLEY, KING, and JOHNSON, Circuit Judges.

APPENDIX A

JOHNSON, Circuit Judge:*

Elijah Davis appeals from the district court's dismissal of his employment discrimination suit and subsequent denial of Davis' motion for reconsideration. We affirm.

In the first eleven months of Davis' tenure as a postal carrier, he received one citation for unsatisfactory work performance, one seven day suspension for unsatisfactory performance, and one [1]

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

fourteen day suspension for unsatisfactory work performance. After exhausting his administrative remedies, Davis filed this suit seeking three million dollars in compensatory damages.

Because the district court correctly concluded that Davis failed to serve and give notice to the proper parties, dismissal was proper. A plaintiff must initiate suit in an employment discrimination complaint within thirty days of receiving the EEOC final agency decision. Bell v. Veterans Administration, 826 F.2d 357 (5th Cir.1987). In the instant case, the EEOC final notice was received on February 17, 1988.

In an employment discrimination suit against an agency, the plaintiff must name and serve the agency head. See Lamb v. United States Postal Service, 852 F.2d

845 (5th Cir.1988). Plaintiff failed to comply with this requirement. If, however, a plaintiff later amends to name the correct defendant, the amendment will relate back to the date of the original filing. Davis, however, cannot avail himself of the relation back doctrine. The relation back doctrine only applies where the proper party has received notice of the institution such that he will not be prejudiced, and either knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. These requirements must be fulfilled within the statutory period, here being thirty days. Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986). In the instant case, service upon the postal service and the United States Attorney

did not occur until July of 1988. Because Davis cannot avail himself of the relation back doctrine, his complaint was not timely filed, and dismissal was proper.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-1594

ELIJAH DAVIS,

Plaintiff-Appellant

versus

U. S. POSTAL SERVICE,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 02/06/90, 5 Cir., 198__, _____ F.2d_____)

(March 20, 1990)

Before REAVLEY, KING, and JOHNSON, Circuit Judges

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and

Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

NO.

A-920

ELIJAH DAVIS,

Petitioner

v.

UNITED STATES POSTAL SERVICE

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 18, 1990.

/S/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 26th day of June, 1990.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ELIJAH DAVIS, *

Plaintiff, *

U. S. POSTAL SERVICE, *

Defendant. *

ORDER

On November 14, 1988, defendant United States Postal Service moved to dismiss plaintiff Elijah Davis' complaint under Fed. R. Civ. P. 12(b)(1), or, in the alternative, under Fed R. Civ. P. 56. Plaintiff Davis has failed to respond to defendant's motion within the 20 days mandated by Local Rules 5.1(e). This court will consider defendant's motion as one for summary judgment. After careful consideration of the summary judgment record as a whole, this Court GRANTS defendant's motion for summary

judgement.

ACCORDINGLY, this Court ORDERS the following:

1. Defendant United States Postal Service's motion for summary judgment is GRANTED;

2. Plaintiff Elijah Davis' complaint is DISMISSED with prejudice.

SIGNED this 16th day of December, 1988.

/s/ Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

(2)

No. 90-154

Supreme Court, U.S.
FILED
AUG 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ELIJAH DAVIS, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15

QUESTION PRESENTED

Whether petitioner's failure either to name the proper defendant under 42 U.S.C. 2000e-16(c), or to provide sufficient notice to the proper defendant for purposes of relation back under Fed. R. Civ. P. 15(c), warranted dismissal of his complaint alleging discrimination in employment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Baldwin County Welcome Center v. *Brown*, 466 U.S. 147 (1984)	7, 8
Brown v. *GSA*, 425 U.S. 820 (1976)	4
Hancock v. *Egger*, 848 F.2d 87 (6th Cir. 1988)	4
Heckler v. *Community Health Services*, 467 U.S. 51 (1984)	7
Hernandez v. *Aldridge*, No. 88-5603 (5th Cir. June 5, 1990)	6
Hernandez v. *Rice*, cert. granted, 110 S. Ct. 1314 (1990)	6
Honeycutt v. *Long*, 861 F.2d 1346 (5th Cir. 1988)	4
Irwin v. *Veterans Administration*, cert. granted, 110 S. Ct. 1109 (1990)	7
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)	8
Lehman v. *Nakshian*, 453 U.S. 156 (1981)	4
Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980)	7
Schiavone v. *Fortune*, 477 U.S. 21 (1986)	3, 5, 6
Toliver v. *County of Sullivan*, 841 F.2d 41 (2d Cir. 1988)	6

Statute and rule:

42 U.S.C. 2000e-16(c)	4, 5, 6
Fed. R. Civ. P. 15(c)	3, 5, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-154

ELIJAH DAVIS, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A15-A19) and the opinion of the district court (Pet. App. D24-D25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1990. A petition for rehearing was denied on March 20, 1990 (Pet. App. B20-B23). On June 26, 1990, Justice White extended the time for filing a petition for a writ of certiorari until July 18, 1990 (Pet. App. C23), and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a postal carrier for the United States Postal Service at the Dallas, Texas, post office from January 19, 1985, until his dismissal on March 21, 1986. In the first eleven months of his tenure as a postal carrier, he received one citation for unsatisfactory work performance, and two suspensions for the same reason. Pet. App. A16-A17. After these disciplinary actions, petitioner was dismissed for submitting a falsified document in an official investigation. EEOC Dec. 3 n.2.[1]

Petitioner's claim that the second suspension was discriminatory was rejected by the Postal Service after full administrative review, and by the Equal Employment Opportunity Commission on appeal from the agency decision. EEOC Dec. 1, 6.[2] Petitioner received notice of the final EEOC action on February 17, 1988. Pet. App. A17; Pet. 5-6.[3]

---

[1] "EEOC Dec." refers to the final EEOC decison of February 12, 1988, rejecting petitioner's claim that his second suspension was discriminatory. We are lodging a copy of this decision and of petitioner's complaint with the Clerk of this Court.

[2] Petitioner's dismissal was not at issue in the administrative proceedings. EEOC Dec. 3 n.2. The judicial complaint and the petition for certiorari are at best ambiguous concerning whether petitioner is seeking judicial review of his dismissal. See Pet. App. A17; Pet. 5-6.

[3] The notice specifically informed petitioner (EEOC Dec. R-1):

> You have the right to file a civil action in an appropriate United States District Court *WITHIN THIRTY (30) DAYS* of the date that you receive this decision • • •. If you file a civil action, *YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT.* • • • Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or, where appropriate, department head, may result in the dismissal of your case. Department means the national organization, for example, Department of Health, Education,

On March 15, 1988, petitioner submitted to the district court an application to proceed in forma pauperis in this case. With that application, he lodged a complaint seeking $3 million in compensatory damages and identifying only the "United States Postal Service" as the defendant. Instead of filing the complaint, the clerk transmitted it directly to a magistrate with the request for leave to proceed in forma pauperis. That request was denied on March 21, 1988. On May 5, 1988, the clerk received petitioner's filing fee and his complaint was filed. Def't Mot. To Dis. 3-4; see Pet. 6. The Postal Service was served on July 7, 1988, and the United States Attorney was served on September 2, 1988. Oct. 31, 1988, Stipulation.[4]

2. The district court granted summary judgment to the Postal Service and dismissed the complaint with prejudice on December 16, 1988. Pet. App. D24-D25. As the district court explained in denying petitioner's motion for reconsideration, the head of the U.S. Postal Service—the Postmaster General—was the only proper defendant in petitioner's Title VII suit, but petitioner instead named as defendant only the Postal Service itself. App., *infra*, 2a-3a. The court recognized that an amended complaint naming the proper defendant could "relate back" to the date of the original complaint under Fed. R. Civ. P. 15(c). But in light of *Schiavone* v. *Fortune*, 477 U.S. 21, 29 (1986), the court concluded that there could be no relation back here, because there was no service of the complaint on the U.S. Attorney or the Postmaster General within the

---

and Welfare (that agency no longer exists) and *not* the local administrative department where you might work.

[4] As the district court noted in denying petitioner's motion for reconsideration (App., *infra*, 3a n. 5), petitioner's service on the Postal Service was technically insufficient because it was accomplished by serving the local Dallas, Texas, postal authorities.

30-day period established by 42 U.S.C. 2000e-16(c). App., *infra*, 3a.[5]

The Fifth Circuit affirmed, using the same analysis as the district court. It noted that petitioner failed to name and serve the agency head within 30 days of his receipt of the final EEOC decision on February 17, 1988, and could not avail himself of the relation back doctrine because the proper party defendant did not receive actual or constructive notice until July of 1988, well after the expiration of the 30-day period. Pet. App. A17-A19.

ARGUMENT

1. The United States, as sovereign, is immune from suit save as it consents to be sued, and such waivers of sovereign immunity are to be strictly construed. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981). By providing remedies against the government for violations of Title VII, Congress has provided the necessary consent (*Brown* v. *GSA*, 425 U.S. 820, 833 (1976)), but the terms of that consent strictly confine the court's jurisdiction to entertain the suit. *Lehman*, 453 U.S. at 160. For these reasons, the court below correctly concluded that the timely filing of a civil action that satisfied the requirements of 42 U.S.C. 2000e-16(c), including the naming of the proper defendant, is a jurisdictional prerequisite to district court consideration of a government employee's Title VII complaint. *Hancock* v. *Egger*, 848 F.2d 87 (6th Cir. 1988); *Honeycutt* v. *Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988).

---

[5] Petitioner's primary argument in seeking reconsideration was that his March 15, 1988, submission of his complaint to the clerk's office should be considered a timely initiation of his suit. But the court noted that even if it were to accept that contention, petitioner failed to name the proper party defendant or to provide timely actual or constructive notice to him. App., *infra*, 2a-3a. The court also concluded that "the summary judgment record fails to support any of [petitioner's] allegations of racial discrimination." *Id.* at 4a.

Section 2000e-16(c) expressly requires that in the civil action authorized by that Section, "the head of the department, agency, or unit, as appropriate, shall be the defendant." This requirement was highlighted in the notice of the right to sue received by petitioner (see note 3, *supra*), which emphasized that "[i]f you file a civil action, *YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT.* * * * Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or, where appropriate, the department head, may result in the dismissal of your case." EEOC Dec. R-1. Despite this clear instruction, petitioner nevertheless failed to name the Postmaster General in his original complaint. Instead, he named only the U.S. Postal Service.

As both the district court and the court of appeals properly held, petitioner cannot cure this defect by amending the complaint and invoking the "relation back" provision of Fed. R. Civ. P. 15(c). Under Rule 15(c), an amendment changing a party against whom a claim is asserted relates back to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable time period. *Schiavone* v. *Fortune*, 477 U.S. 21, 29 (1986). Petitioner has failed to satisfy that requirement. Since petitioner received the final EEOC decision denying his claim of discrimination on February 17, 1988, his time to perfect his claim for judicial relief by filing his complaint and giving actual or constructive notice to the Postmaster General expired on March 18, 1988. Even assuming petitioner's complaint was timely filed,[6]

---

[6] Since petitioner failed to provide timely notice to the proper defendant, it is not necessary to consider whether the submission of his complaint to the district court clerk's office on March 15 constituted a timely filing of his complaint. In our response in *Hernandez* v. *Rice*, No. 89-486, we suggested that receipt by the district court

it is clear that the Postmaster General did not receive timely notice of it. There was no service on any postal official until July 7, 1988.[7] Service on the U.S. Attorney—which provides constructive notice to the Postmaster General (Fed. R. Civ. P. 15(c))—was not effected until September 2, 1988. App. *infra*, 3a. Petitioner is thus plainly in error in suggesting (Pet. 10), without explanation, that "holding that [the March 15 application for in forma pauperis status] satisfied the 30-day limitations period would not seem to offend *Schiavone* v. *Fortune* [*supra*]."

2. Petitioner correctly observes (Pet. 9-10) that the courts of appeals are divided over the question whether the requirement of 42 U.S.C. 2000e-16(c) that discrimination complaints against the federal government be filed within thirty days of receipt of notice of final administrative action is a statute of limitations subject to equitable tolling or a jurisdictional requirement that cannot be waived or enlarged on the basis of equitable considerations. That

---

clerk's office of the discrimination complaint with a request to proceed in forma pauperis might constitute "filing" for purposes of Section 2000e-16(c). The Court granted certiorari in that case, vacated the judgment of the court of appeals, and remanded for consideration of that question. 110 S. Ct. 1314 (1990). On remand, the Fifth Circuit concluded that the plaintiff's lodging—which named the proper defendant—satisfied the requirement of 42 U.S.C. 2000e-16(c). *Hernandez* v. *Aldridge*, No. 88-5603 (June 5, 1990). Although Hernandez's request to proceed in forma pauperis was ultimately granted, petitioner's request was denied. Cf. *Toliver* v. *County of Sullivan*, 851 F.2d 41, 42 (2d Cir. 1988) ("At least where in forma pauperis relief is granted," Title VII employment discrimination complaint treated as timely filed when received by the clerk's office, although not formally filed and docketed until after the expiration of the statutory period.).

[7] Local postal officials were served on that date. It is far from clear that such service can be considered constructive notice to the Postmaster General under Rule 15(c) (see *Schiavone* v. *Fortune*, 477 U.S. at 29; App., *infra*, 3a n. 5).

question is presented in *Irwin* v. *Veterans Administration*, cert. granted, 110 S. Ct. 1109 (1990). There is no need for this Court to hold this case pending the decision in *Irwin*. The decision below turned on petitioner's failure to name the proper defendant, and the application of *Schiavone* to his claim of a right to "relation back" under Rule 15(c), rather than on his failure to file a timely complaint.

In any event, petitioner has not suggested any viable equitable basis for tolling the statutory requirement in this case. Petitioner's sole equitable claim is that he should be relieved of compliance with the statutory requirements because he was proceeding pro se. Pet. 8-10. But this Court has held that timeliness requirements may not be disregarded simply because the plaintiff may be a "victim[ ] of discrimination who [must] proceed without the assistance of counsel." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 824 (1980). Cf. *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (statutory time limit for filing a Title VII action against private employer not satisfied by pro se plaintiff's timely filing of right-to-sue letter in place of complaint; plaintiff's pro se status was not a basis for excusing noncompliance with Federal Rules of Civil Procedure regarding commencement of actions or for tolling limitations period).

Petitioner can claim no other grounds for equitable relief from the filing requirements. There is no basis for a claim that affirmative misconduct on the part of the defendant lulled the petitioner into inaction, see *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984); nor is there any basis for a claim that petitioner received inadequate notice of the applicable requirements. Instead, petitioner was specifically advised in the EEOC's right to sue notice of the need to file his complaint within 30 days, and to identify the "Official Agency Head or Department Head" in that complaint (EEOC Dec. R-1). He was further

warned that his failure to provide the "Name or Official Title" of that person might result in the dismissal of his case. *Ibid.* As this Court has held, the equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioner's "failure to take the minimal steps necessary" to preserve his claim. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. at 151 (1984) (particularly where plaintiff is informed of what he must do to preserve his claim, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence").

CONCLUSION

The petition for a writ of ceriorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

AUGUST 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-88-1008-R

ELIJAH DAVIS, PLAINTIFF

VS.

U.S. POSTAL SERVICE, DEFENDANT

[Filed February 14, 1989]

MEMORANDUM OPINION & ORDER

This is an employment discrimination case. On December 16, 1988, this Court granted defendant's motion for summary judgment and dismissed plaintiff's case *with prejudice* when plaintiff failed to respond. Plaintiff Davis then filed the present motion for reconsideration on December 28, 1988.[1] After considering plaintiff's motion and the defendant's opposition, this Court DENIES plaintiff's motion for reconsideration.

---

[1] Actually, this Court has consolidated three separate filings: (1) on December 25, 1988, plaintiff filed *pro se* a letter entitled "Requests and Explanation"; (2) attorney for plaintiff filed a formal motion for reconsideration on December 2; and (3) plaintiff filed another *pro se* supplement to the motion to reconsider on February 1, 1989.

FACTS

Plaintiff Davis received an appointment to be a postal carrier on January 19, 1985. By December 16, 1985, plaintiff had amassed one citation for unsatisfactory work performance,[2] one seven-day suspension for unsatisfactory work performance,[3] and one fourteen-day suspension for unsatisfactory work performance.[4] After making his way through the administrative procedures of the Merit Systems Protection Board and Equal Employment Opportunity Commission ("EEOC"), plaintiff filed this suit seeking compensatory damages in the amount of three million dollars.

ANALYSIS

Defendant's primary argument is that plaintiff's failure to initiate suit within thirty days of receiving the EEOC final agency decision upon his discrimination complaint precludes plaintiff's suit. The thirty day time limit is well-recognized within this jurisdiction. *E.g., Bell v. Veterans Administration*, 826 F.2d 357, 360-61 (5th Cir. 1987). Plaintiff received the final EEOC notice on February 17, 1988. Plaintiff did not file this suit formally until May 5, 1988.

Plaintiff, however, contends that his filing of an *in forma pauperis* petition on March 15, 1988 should constitute the formal commencement of his suit. Even, however, should this Court construe the petition as a valid initiation of suit, plaintiff still failed to give timely notice to defendants because he served the wrong parties. In an employ-

[2] *See* Defendant's Memorandum In Support of Motion to Dismiss With Prejudice ("Defendant's Memorandum") at Exhibit 1, Attachment 3.

[3] *Id.* at Attachment 4.

[4] *Id.* at Attachment 5.

ment discrimination suit against an agency, the plaintiff must name and serve the agency head. *E.g., Dacus v. U.S. Postal Service*, No. 87-6067 (5th Cir. February 24, 1988); *Lamb v. U.S. Postal Service*, 852 F.2d 845, 846 (5th Cir. 1988). Plaintiff failed to comply with this requirement as he merely named the postal service as defendant.

Defendant acknowledges that, ordinarily, such a defect may be cured by amending the complaint and relating the amendment back to the initial filing. *See* Fed.R.Civ.P. 15(c). This cure, however, can only be utilized if the proper party has: (1) received such notice of the institution that he will not be prejudiced, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. *Id.* Moreover, these requirements must be fulfilled within the statutory time limit. *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986). In this case, defendant stipulated that the service upon the U.S. Postal Service did not occur until July 7, 1988,[5] and the United States Attorney was not served until September 2, 1988—dates clearly outside the thirty-day time period. Thus, plaintiff may not avail himself of the relating back provision of Fed.R.Civ.P. 15(c).[6]

---

[5] Plaintiff's service upon the Postal Service was accomplished by serving local postal officials. Such service is technically insufficient. *See Dacus v. United States Postal Service*, No. H-86-2329, slip op. at 4 (S.D. Tex., June 15, 1987); Fed.R.Civ.P. 4(d)(4) and (5).

[6] This Court is sympathetic to plaintiff's *pro se* status at the outset of this case and any possible confusion that may have resulted from a lack of knowledge regarding rules of civil procedure. Nonetheless, the rules regarding proper service and notice serve a crucial role in our system and must be complied with. The consequences of non-compliance are well illustrated by the attempt by plaintiff in this case to seek a default against defendant when defendant had not yet received proper notice. *See* Order of October 25, 1988.

Lastly, the summary judgment record fails to support any of plaintiff's allegations of racial discrimination. This is but one additional fact supporting the granting of defendant's motion for summary judgment.

According, for the above reasons this Court ORDERS the following:

1. Plaintiff's Motion for Reconsideration is DENIED.

SIGNED THIS 14th DAY OF FEBRUARY, 1989

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
United States District Judge

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/20055